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July 31, 2015

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Lago Resort & Casino, LLC
White 414, LLC
Wimorite, Inc.
Wilpac Holdings, LLC
Wimot Gaming, LLC
1265 Scottsville Road
Rochester, NY 14624
Attn: Thomas C. Wilmot, Sr.

Wilpac Funding, LLC
10250 Constellation Blvd.
Suite 2230
Los Angeles, CA 90067
Attn: Brent Stevens

2015 AUG -5 AM 8:02
RECEIVED
DEPT OF ENVIRONMENTAL CONSERVATION

Re: Notice of Intent to Sue for Clean Water Act Violations, Pursuant to 33 U.S.C. § 1365(b)

Dear Mr. Wilmot and Mr. Stevens:

Complainants, Dagmar Nearpass, Robert Barbuto, Lynn Barbuto, James Dawley and Desiree Dawley, by and through their undersigned counsel, hereby provide notice of intent to sue Lago Resort & Casino, LLC, Whitetail 414, LLC, Wilmorite, Inc., Wilpac Holdings, LLC, Wilmot Gaming, LLC, Wilpac Funding, LLC (herein collectively "Wilmont") for violations of the federal Clean Water Act ("CWA" or the "Act"), 33 U.S.C. § 1251 *et seq.* Specifically, this letter gives notice of the Complainants' intent, pursuant to 33 U.S.C. § 1365(b), to seek redress for (i) illegal discharges into waters of the United States from point-source discharges owned and/or operated by Wilmont at or near the parcel proposed for the development of the Lago Casino and Resort in the Town of Tyre, Seneca County, New York (the "Wilmont Property")¹;

¹ The Wilmorite Property is at or near S.B.L No. 12.00-01-36, and is generally bounded by the New York State Thruway (I-90) to the east and Route 414 to the south.

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This notice is being sent to you as an owner or operator of the Wilmont Property, and as a prerequisite to commencing litigation against you in the U.S. District Court, Western District of New York, for injunctive relief requiring you to remedy violations of the Clean Water Act, as well as for the imposition of civil penalties of up to \$37,500 per day of violation, together with the Complainants' attorneys' fees in connection with any such action. On information and belief, Wilmont's Clean Water Act violations began in December 2014 at the commencement of construction at the Wilmont Property, and are continuing.

Wilmont Has and Continues to Violate the Clean Water Act.

The proposed casino development will consist of an approximately 210,640 sq. ft. gambling casino, a six-story 208 room hotel, a four-story parking garage for approximately 790 vehicles, and surface parking for approximately 2,400 vehicles, together with roads, driveways, and other associated facilities.

The Wilmont Property is located in a rural area near, and is hydrologically connected to, the Montezuma National Wildlife Refuge (the "Wildlife Refuge"), a seven-thousand acre wildlife preserve composed of swamps, pools and channels located mostly within the Town of Tyre and operated by the United States Fish and Wildlife Service. The Wildlife Refuge is a stopping-point for migratory birds and is home to six active bald eagle nests. The Wildlife Refuge "is situated in the middle of one of the busiest bird migration routes on the Atlantic Flyway. More than 240 species of birds can be found on the refuge, along with 43 species of mammals, 15 species of reptiles, and 16 species of amphibians." (<http://www.dec.ny.gov/outdoor/55687.html>).

Prior to Wilmont's current development, most of the site was characterized as active or fallow agriculture, interspersed with wetlands and forests. On information and belief, stormwater conveyed via a pipe under I-90 from the northwest corner of the PETRO Gas Station located across I-90 from the site enters the Wilmont Property on the central western portion of the site, traverses the site via a ditch and exits at the western boundary. Prior to site development, on information and belief based upon aerial pictures (attached as Exhibit 1), stormwater entering the site flowed to and passed through an on-site wetland, which no longer appears present on the site due to Wilmont's land-clearing activities,² before exiting the site. Upon leaving the site, stormwater flows into an off-site wetland to the north, which, on

² In Wilmorite's original submissions to the Town, Wilmorite referenced a wetland delineation report that identified this on-site wetland as being jurisdictional under Federal law. In an about face, Wilmorite now indicates that this wetland is not jurisdictional. Satellite imagery, topography, soil data, and information from adjacent landowners indicate proper classification of this area as a federally jurisdictional wetland with hydrologic connectivity to wetlands north of the site.

Page 5

See General Permit, I.D, I.F.5. Upon information and belief, the increase in turbidity, sediment discharges, and the residue from petroleum referenced herein is a violation of New York water quality standards, which is a violation of the General Permit.

As a result of Wilmont's actions as described herein, Wilmont has discharged, is discharging, and will continue to discharge pollutants from point sources into waters of the United States. These point source discharges are not pursuant to an approved NPDES or SPDES permit. In addition, Wilmont's actions have resulted in the discharge of dredged or fill material into a water of the United States without securing a permit from the U.S. Army Corps of Engineers. Thus, Wilmont has violated, is violating, and will continue to violate the Clean Water Act by illegally discharging pollutants into waters of the United States and illegally discharging dredged and fill materials into a water of the United States.

If Wilmont fails to take action to remedy these violations within sixty (60) days, the Complainants will commence an action seeking (1) judicial relief ordering Wilmont to remedy the violations; (2) an order seeking administrative fines and/or penalties up to \$37,500 per violation, per day; and (3) the costs of litigation, including reasonable attorneys' fees and expert witness costs.

We look forward to your prompt compliance.

Very truly yours,



Ian Shavitz

cc:

Gina McCarthy, Administrator
United States Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Judith Enck, Regional Director
US Environmental Protection Agency, Region 2
290 Broadway
New York, NY 10007-1866

Marc Gerstman, Acting Commissioner

EXHIBIT 1

EXHIBIT 2











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and (ii) the unauthorized and unpermitted discharge of dredged or fill material into a water of the United States located north of the Wilmont Property.

Clean Water Act Provisions

The Complainants are persons within the meaning of the citizen suit provision of CWA Section 505(a), 33 U.S.C. § 1365(a). Section 402 of the CWA prohibits the discharge of pollutants from a point source to waters of the United States, except pursuant to and in compliance with a National Pollutant Discharge Elimination System (“NPDES”) permit. 33 U.S.C. §§ 1311(a), 1342. The U.S. Environmental Protection Agency (“USEPA”) has delegated to the New York State Department of Environmental Conservation (“NYSDEC”) the authority to issue, enforce, and administer permits under Section 402 of the CWA. NYSDEC issues permits pursuant to Section 402 of the CWA under its State Pollutant Discharge Elimination System (“SPDES”) permit program. Section 404 of the CWA prohibits the discharge of dredged or fill materials into navigable waters at specified disposal sites without a permit. 33 U.S.C. § 1344(a). The U.S. Army Corps of Engineers (“USACE”) issues permits pursuant to Section 404 of the CWA.

The CWA defines the term “pollutant” as including, but not being limited to, “dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharging into water.” 33 U.S.C. § 1362(6). Sediment constitutes a pollutant under the Act. The discharge of a pollutant is “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12). A “point source” is “any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14).

Section 301 of the CWA also prohibits discharges that are not in compliance with CWA section 404, which regulates the discharge of dredged or fill material into navigable waters. 33 U.S.C. § 1311(a); 33 U.S.C. § 1344(a), (d). Navigable waters are defined as “waters of the United States.” 33 U.S.C. § 1362(7). The discharge of dredged material includes additions to water “incidental to any activity, including mechanized landclearing, . . . or other excavation.” 33 C.F.R. § 323.2(d)(1)(iii); *see* 33 C.F.R. § 323.2(d)(2)(i) (including “earth-moving activity”). The CWA defines fill materials as material placed in waters of the United States that has the effect of “[c]hanging the bottom elevation of any portion of a water of the United States.” 33 C.F.R. § 323.2(e)(1)(ii). Fill materials include, *inter alia*, “rock, sand, [and] soil . . .” 33 C.F.R. § 323.2(e)(2).

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information and belief, is jurisdictional under Federal and State law. This wetland is connected with and flows to White Brook, and then ultimately to the Montezuma National Wildlife Refuge wetland complex. Both White Brook and the Montezuma wetlands are important aquatic habitats that contain plants and animals that are sensitive to the impacts of increased sedimentation and chemical contamination.

Prior to construction, on information and belief, stormwater leaving the Wilmont Property was clear and free from sediment. Almost immediately after construction commenced, residents of surrounding properties, including Complainants, witnessed significant deposition of sediment in the waters leaving the site and entering the off-site wetland and White Brook. The waters receiving the discharges described in this Notice are navigable waters of the United States. As shown in the photographs (attached as Exhibit 2), waters exiting the Wilmont Property, which normally ran clear prior to site construction, show high turbidity levels. For comparison, similar drainage channels that do not run through the site are shown in photographs (attached as Exhibit 3); these photographs were taken contemporaneously with the photographs showing the pollution runoff.

During construction, piles of dirt were and continue to be stockpiled on the Property. Each rain resulted in sediments being discharged from these uncovered piles into the off-site jurisdictional wetlands. In addition, on information and belief, Wilmont has modified a ditch on the Wilmont Property by widening it. Stormwater runoff containing pollutants has been discharged into this ditch and has entered into the navigable waters of the United States. In addition, during a visit to the area that receives the waters draining from the Property, it was noted that these waters had an oil-like sheen.

Upon information and belief, Wilmont has obtained coverage under the SPDES General Permit for Stormwater Discharges from Construction Activities, Permit No. GP-0-15-002 (the "General Permit"). The General Permit, among other things, requires the development of and compliance with a stormwater pollution prevention plan ("SWPPP"), which requires the stabilization of disturbed areas and the installation of other stormwater controls. See General Permit, III.A.1, III.B.1.f. Upon information and belief, Wilmont has violated the General Permit by failing to comply with the SWPPP. See General Permit, VII.A.

The General Permit also requires the holder to control discharges necessary to meet applicable water quality standards per Part I.D., and states that it shall be a violation of the law if discharges under the permit result in (i) an "increase in turbidity that will cause a substantial visible contrast to natural condition;" (ii) an "increase in suspended, colloidal, or sediment solids that will cause deposition or impair waters for their best usages;" and (iii) "residue from oil and floating substances." *Id.* Moreover, the General Permit does not permit water quality violations.

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We look forward to your prompt compliance.

Very truly yours,



Ian Shavitz

cc:

Gina McCarthy, Administrator
United States Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Judith Enck, Regional Director
US Environmental Protection Agency, Region 2
290 Broadway
New York, NY 10007-1866

Marc Gerstman, Acting Commissioner

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New York State Department of Environmental Conservation
625 Broadway
Albany, NY 12233-3505

Paul D'Amato, Regional Director
New York State Department of Environmental Conservation, Region 8
6274 E. Avon-Lima Road
Avon, NY 14414-9519

EXHIBIT 1



New York State Thruway (Toll Road)

© 2015 Google

Imagery Date: 9/24/2013 42°58'11.61" N 76°50'41.18" W elev: 9

GO

EXHIBIT 2





Akin Gump

STRAUSS HAUER & FELD LLP









EXHIBIT 3



